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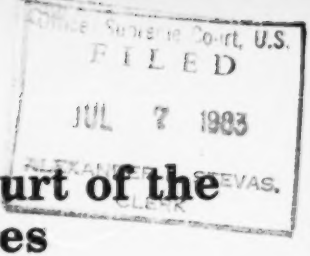

No. _____

In the Supreme Court of the United States

October Term, 1983

DARCIA M. FLEURY,
DONALD L. FLEURY,
SUSAN ADELE FLEURY,
and DARLEEN ANN FLEURY,

Petitioners,

v.

HARPER & ROW, PUBLISHERS, INC.,
a Foreign Corporation;
MANNITOU ENTERPRISES UNLIMITED, INC.,
a Foreign Corporation,
and LINDA GOODMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STANLEY FLEISHMAN
A Professional Corporation
2049 Century Park East
Suite 3160
Los Angeles, California 90067
(213) 551-2923
Attorney for Petitioners

Westside Law Publishers Santa Monica, California (213) 450-1965

QUESTIONS PRESENTED

1. Whether the federal courts below acted arbitrarily, and denied petitioners of property without substantive due process of law in violation of the Fifth Amendment to the United States Constitution, in holding that for purposes of the Uniform Single Publication Act, California's already short one year statute of limitations began to run against California citizens, suing in a federal court in California, before the offending book was published in California and before it was available for sale in bookstores throughout the nation.

2. Whether California Code of Civil Procedure § 340(3), as construed by the federal courts below, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because the statute as construed began to run before petitioners could have known of the libelous publication, and before they suffered any harm.

3. Whether, contrary to the holdings of the federal courts below, California's statute of limitations for libel, for purposes of the Uniform Single Publication Act, does *not* begin to run until the book is available for sale in bookstores throughout the nation.

4. Whether, contary to the holdings of the federal courts below, California's statute of limitations for libel does *not* begin to run against California citizens, suing in a federal court in California, until the offending book is published in California.

5. Whether the federal courts below failed to follow California law holding that the reprinting of a libelous book causes the statute of limitations to start running from the date of each reprinting.

6. Whether the courts below erred in refusing to hold that respondents were estopped form asserting that the book was published prior to November 16, 1978, because

they swore that the book was published on December 25, 1978, in their application for a certificate of copyright, filed with the Copyright Office.

7. Whether, contrary to the holdings of the federal courts below, California's "rule of discovery" applies to this case.

8. Whether the Court of Appeals for the Ninth Circuit denied petitioners procedural due process of law in violation of the Fifth Amendment to the United States Constitution when it refused to perform its constitutional duty to review issues of law decided by the District Court.

9. Whether the United States Court of Appeals for the Ninth Circuit improperly "abstained" from resolving substantial legal questions raised by petitioners in their diversity action, by invoking the "clearly erroneous" rule in reviewing the legal questions decided by the District Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 698 F.2d 1022 (Appendix A,A1-A14). The District Court's order granting defendants' motion for summary judgment filed July 14, 1981 is unreported. (Appendix B, A15-A20). The District Court's order denying petitioners' motion for an order to alter or amend the judgment filed September 13, 1981 is unreported. (Appendix C, A21-A23).

[1]The caption of the case reflects all of the interested parties herein.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on February 9, 1983. Petitioners' timely petition for rehearing was denied on March 10, 1983. (Appendix D, A24.) On May 27, 1983, Mr. Justice Rehnquist signed an order extending petitioners' time within which to file a petition for writ of certiorari to and including July 8, 1983. (No. A-957). The jurisdiction of this Court is invoked under 28 U.S.C. § 1245(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of . . . property, without due process of law. . . .

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of . . . property, without due process of law. . . .

3. Article III § 1 of the Constitution provides in relevant part:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

4. Article III § 2[1] of the Constitution provides in relevant part:

> The judicial Power shall extend to all Cases. . . between Citizens of different States. . . .

5. 28 U.S.C. § 43a provides:

> There shall be in each circuit a court of appeals, which shall be a court of record, known as the United States Court of Appeals for the circuit.

6. 28 U.S.C. § 1291 provides in relevant part:

> The courts of appeals. . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.

7. 28 U.S.C. § 1332 (a) (1) provides:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between citizens of different states. . . .

8. California Code of Civil Procedure § 340 (3) provides that within one year an action for libel must be commenced.

9. California Code of Civil Procedure § 351 provides:

> If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

10. California Civil Code § 3425.1 provides:

> This title may be cited as the Uniform Single Publication Act.

11. California Civil Code § 3425.2 provides:

> This act shall be so interpreted as to effectuate its purpose to make uniform the law of those states or jurisdictions which enact it.

12. California Civil Code § 3425.3 provides:

> No person shall have more than one cause of action for damages for libel or . . . invasion of privacy or any other tort founded upon any

> single publication. . . such as any . . . book . . . . Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

13. California Civil Code § 3425.4 provides:

> A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication. . . .

STATEMENT OF THE CASE

1. On November 16, 1979, petitioners, residents of California, filed a diversity action in the United States District Court for the Southern District of California, alleging that they were libeled, and their privacy was invaded when respondents identified them by name in a derogatory and embarrassing fashion in a national best selling book - *Love Signs*. The respondents are HARPER & ROW, PUBLISHERS, INC., the publisher, LINDA GOODMAN, the author, and MANNITOU ENTERPRISES UNLIMITED, INC., the copyright owner of the offending book.

Petitioners DONALD L. FLEURY and his wife, DARCIA M. FLEURY are named and identified in the book. Their complaint alleges that a reasonable person reading the book would believe that they have serious marital problems; that they are argumentative and may be headed for a nervous breakdown; that they have a compulsion for romance that can lead to unfaithfulness and the breaking of their marrige; that the sexual chemistry of their relationship is mostly a mental affinity; that they engage in a wide variety of sexual practices; that they are traumatized trying to decide whether to shove their two daughters out of their home; and that they need to have their family's

"tangled togetherness" straightened out by their daughters.

Petitioners SUSAN ADELE FLEURY and DARLEEN ANN FLEURY, the daughters of Darcia and Donald, allege that they were named and identified in the book and that a reasonable person reading it would believe that they are homebodies, afraid to leave home, afraid or unable to marry, and afraid to have a career; that they are immature and unproductive persons causing a trauma for their parents; that their parents want to shove them out of the family home; that if they ever got married, they would bring their husbands home "to live with mama and papa"; that if they ever had children, they would probably raise them in their parents' home; and that they are interfering with the "second honeymoon" that their parents "desperately need."

The complaint alleged that the book was published on or about December 15, 1978, and thereafter distributed throughout the United States. In their answer, respondents alleged that petitioners' action was time barred by § 340(3) of the California Code of Civil Procedure because, respondents asserted, the book was published on or about November 14, 1978, and petitioners' action was not filed until November 16, 1979.

2. On June 17, 1981, respondents moved for summary judgment, alleging that the book "was first published in *Pennsylvania* and/or *New York*" on November 14, 1978. The motion was supported by affidavits of Carl Scioscia, Elizabeth Ford, James Fox, Florence Goldstein, and Linda Goodman.

Scioscia was in charge of inventory and shipping at Harper & Row's warehouse in *Pennsylvania*. He asserted that the *initial* printing of the book consisted of 139,500 copies, approximately 40,000 copies of which were placed in the hands of common carriers in Pennsylvania for shipment to various parts of the country prior to

November 16, 1978.

Ford manages Harper & Row's bookstore located in *New York City.* She alleged that to the best of her recollection, copies of the book were on display and available for sale to the general public at Harper & Row's bookstore on November 13, 1978.

Fox is an attorney employed by Harper & Row. He asserted that he was informed by Harper & Row warehouse personnel that the first shipment of the book took place no later than November 10, 1978, from the warehouse, in Pennsylvania. He also asserted that on November 14, 1978, he attended a party given by Harper & Row, in New York City, to honor Linda Goodman, the author of the book. He observed Linda Goodman autograph copies of the book and give them to various persons.

Goldstein was also an employee of Harper & Row, and made arrangements for the party honoring Linda Goodman. She observed Linda Goodman give copies of the book to guests at the party, and also observed the book prominently displayed at Harper & Row's bookstore on November 14, 1978.

Linda Goodman stated that on November 14, 1978 she attended a party given by Harper & Row in New York City, honoring her, and that she autographed copies of the book and gave them to various persons.

Respondents conceded that no copy of the book had reached California prior to November 16, 1978, and that prior to that date, the book had not been placed on sale any place other than in New York City.

Petitioners, in their opposition to the motion for summary judgment asserted, *inter alia*, that respondents were estopped from contending that the book was published prior to November 16, 1978, because respondents had sworn that the book was published on December 25,

1978, when they applied for a certificate of registration of copyright from the United States copyright office, and because respondents publicly announced that the publication date was December 25, 1978.

3. On July 13, 1981, the District Court made its order granting summary judgment. The District Court noted that "the book was printed and shipped in Pennsylvania, sold initially in New York, and later [after November 16, 1978] was received . . . in California." The District Court stated that all three states have a one-year statute of limitations for this type of lawsuit and saw "no significant difference between the laws of the three relevant states."

The District Judge concluded that the Pennsylvania, New York and California cases contained only "generalized statements" concerning the relevant law and stated that he "must determine at what point in the publication process a book is first considered 'published' for purposes of the single publication rule." (A17)

The District Court rejected petitioners' contention that the California statute of limitations did not begin to run for purposes of the Uniform Single Publication Act earlier than the date on which the book went on sale to the public at bookstores throughout the United States, including California. The court saw no reason to try and define "publication" as the time when distribution spread to California because "it is immaterial whether plaintiff was aware that publication had occurred." (A18) Ultimately, the District Court concluded that placing copies of the book on sale in New York City "was sufficient to start the running of the statutue." (A19) The court explained:

> A . . . reasonable date to use for 'publication' is the date when the first copies of the general distribution of the book went on sale to the public. *Cf., Zuck*, 317 F.2d at 722. . . . Choosing one day as 'the' date of publication is, of

> necessity, a somewhat arbitrary decision. Using the date the book first went on sale is desirable because it is a firm, easily verifiable date of actual access to the book by the public. It is much less arbitrary than trying to decide when 'most' copies were distributed.

(A18)

4. On July 23, 1981, petitioners filed a motion to alter or amend summary judgment, alleging, *inter alia*, that the District Court opinion was in conflict with *Zuck v. Interstate Publishing Corp.*, 317 F.2d 727 (2d Cir. 1963) and *Osmers v. Parade Publications, Inc.*, 234 F.Supp. 924 (S.D. N.Y. 1964). Petitioners argued that for purposes of the single publication rule, the book was not published in Pennsylvania, California or New York prior to November 16, 1978. They noted that most printers are in the east and that it takes two to six weeks for the books to get to the west coast. If the first "sale" on the east coast started the statute of limitations running under the Uniform Single Publication Act, petitioners argued, it "would mean that we would have a shorter period of limitations out here in California than on the east coast" and that would be particularly grievous where the injury is to a person living in California.

The District Court rejected petitioners' argument that the statute of limitations would not have run against petitioners under New York law, even though the book was displayed for sale in New York City prior to November 16, 1978, and therefore it could not reasonably be said that the California statute of limitations began to run prior to November 16, 1978, even before the book arrived in California.[1] The court stated:

> Well, counsel, I'm inclined to believe it's publi-

[1] *See*, California Code of Civil Procedure § 351.

> cation in New York, and if it's publication in New York, it's publication here.

On September 18, 1981, the District Court filed its order denying the motion to alter or amend the summary judgment, stating:

> Plaintiffs urge that the decision in *Zuck v. Interstate Publishing Co.* . . . compels this court to alter the prior judgment. . . . Contrary to plaintiff's assertion, *Zuck* does not hold that nationwide sales are a *prerequisite* to accrual of the libel claim. . . . A requirement of national distribution, as the plaintiff urges this court to adopt, ignores the well established principle that the cause of action accrues even if the plaintiff is unaware that a cause of action exists. . . . Moreover, requiring national distribution would force both litigants and the courts to make fine distinctions as to what constitutes 'nationwide' distribution.
>
> Plaintiffs also point to the case of *Wiliams v. RHG Publishing*, 7 Med.Law Rptr. 1372 (NY Sup.Ct., April 23, 1981) as requiring this court to amend its July 14, 1981 judgment. *Williams*, however, is distinguishable because there was no evidence in that case which indicated that a general release had taken place.

(A21-A22)

The Court of Appeals acknowledged that the District Court was in error in its interpretation of Pennsylvania law, saying:

> The parties identified three states whose laws might control the disposition of the case, Pennsylvania, New York, and California. All three have adopted the single publication rule, Pennsylvania

> and California by statute, and New York by court decision. Each of the three states has a one-year statute of limitation governing this type of action. The district court made no choice of law, opining that it was unnecessary inasmuch as the law of the three states is the same. This conclusion is not necessarily correct. . . . *Dominiak v. National Enquirer*, 439 Pa. 222, 266, A.2d 626 (1970).

(A3-A4)

But the Ninth Circuit declined the District Court's invitation to review its legal rulings. After holding that "national distribution" was not required to start the statute of limitations running, the District Court stated:

> It may be a good file to get a rule in the Ninth Circuit, an easy and inexpensive way to get it. . . . Let's see what my more learned brothers do in the Ninth Circuit.

Although the Court of Appeals stated that "the laws of the state of New York are identical with those of California" and that accordingly "there is no reason to reject the law of" California, the Court of Appeals studiously avoided discussing the law of New York. In affirming the judgment of the District Court, the Ninth Circuit refused to review the correctness of the District Court's legal conclusions by invoking the "clearly erroneous" doctrine:

> In the present case, the District Court held that, under California law, the cause of action for libel accrued prior to November 16, 1978. This determination will be accepted on review unless it is found to be "clearly erroneous."

(A7)

REASONS FOR GRANTING WRIT

In this case a federal court, exercising its diversity jurisdiction, was called upon to determine when the California statute of limitations begins to run for purposes of the Uniform Single Publication Act. The case raises problems "of almost incredible complexity" (*Zuck v. Interstate Publishing Corp., supra*, 317 F.2d at 733). The case involves issues that are recurring, of national importance, and they require clarification by the Court. Issues similar to those involved in this case are already before the court in *Keeton v. Hustler Magazine, Inc.*, 103 S.Ct. 813, a case involving "multi-state defamation" and the running of a state statute of limitations.

The Uniform Single Publication Act was enacted to be used as a shield, to avoid multiple cases against a defendant. In the case at bar, however, it has been used as a sword, to prevent petitioners from prosecuting even a single action. Petitioners submit that contrary to the judgment of the courts below herein neither the wording of the Uniform Single Publication Act nor the policy behind it "requires a holding that the period of limitations begins to run from the time of the first publication." *Dominiak v. National Enquirer*, 439 Pa. 222, 266 A.2d 626, 629 (1970).

The Ninth Circuit erred, and failed to perform its constitutional duty in this case when it refused to review, on an appeal properly presented to it, important national questions of law, decided by an inferior tribunal.

The rule of law involved in this case is not a parochial local rule, where a federal District Judge sitting in California is better able than a Circuit Court to predict how the California Supreme Court would decide the case, if it were before that court. The California legislature has ordained that the Uniform Single Publication Act "shall

be to interpreted as to effectuate its purpose to make uniform the law of those states or jurisdictions." California Civil Code § 3425.2. The Court of Appeals is, under the constitution, better qualified to perform this task than the District Court. The Ninth Circuit bowed to the District Court in this case, stating that in diversity cases it should defer to the District Judge's interpretation or construction of the law of the state in which he sits. But the Ninth Circuit does not always yield its judgment in diversity cases to a District Court, attempting to "find" state law. *See, United States v. Gutterman*, 701 F.2d 104 (9th Cir. 1983). Other circuits have also felt free to perform their appellate duty and review questions of law decided by a district court in diversity actions, without abdicating their authority to an inferior tribunal. *See, e.g., Aetna Casualty & Surety Co. v. General Time Corp.*, 704 F.2d 80 (2d Cir. 1983); *Taylor v. Ford Motor Co.*, 703 F.2d 738 (3d Cir. 1983).

The issue here is similar to that found in *Factors, etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278 (2d Cir. 1981) *cert. den'd* 102 S.Ct. 1973 (1982). *See also, Factors, etc., Inc. v. Pro Arts, Inc.*, 701 F.2d 13 (2d Cir. 1983), where Judge Mansfield argued that Circuit judges sitting in the Second Circuit are in as good a position as the judges in the Sixth Circuit "to define what would be the position of the Supreme Court of Tennessee on the issue of whether the right of publicity is defendable." In the case at bar the Ninth Circuit had a duty to fully review the questions of law decided by the District Court. "Deference" was particularly inappropriate in this case since the District Court "found" California law by interpreting (or as petitioners see it, misinterpreting) New York law.

I

THE FEDERAL COURTS BELOW DENIED PETITIONERS OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION. THE DISTRICT COURT ARBITRARILY DENIED PETITIONERS THEIR DAY IN COURT. THE COURT OF APPEALS IMPROPERLY INVOKED THE "CLEARLY ERRONEOUS" RULE, THUS FAILING TO GIVE PETITIONERS THE FULL APPELLATE PROCEDURE "DUE" THEM UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES.

It is settled that action by the judiciary, like action by the legislature, may deprive a person of federal constitutional rights. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930). That is what occurred in this case.

A.

The District Court found only "generalized language" on how the California courts would decide the issue, and concluded that it had to decide the case in accordance with what it thought was "reasonable." In rejecting petitioners' argument that the California statute of limitations did not start to run, for purposes of the Uniform Single Publication Act, prior to the time that the book was published in California and prior to the time that it was in bookstores throughout the United States, the District Court stated:

> [R]equiring national distribution would force both litigants and the courts to make fine distinctions as to what constitutes 'nationwide' distribution. . . . [I]t is essential that a specific, easily identifiable date be chosen so that litigants can easily identify the date the cause of action

> accrues and correspondingly the date the cause is extinguished by the statute of limitations. Therefore, this court holds that the cause of action accrues when the *first* copies of the general distribution of the book go on sale.

(A22) (emphasis added.)

The District Court *mistakenly* asserted that this conclusion was in accord with New York and Pennsylvania law. *See, Dominiak v. National Enquirer,* 439 Pa. 222, 266 A.2d 626 (1970); *Zuck v. Interstate Publishing Corp.,* 317 F.2d 727 (2d Cir. 1963); *Osmers v. Parade Publications, Inc.* 234 F.Supp. 924 (S.D. N.Y. 1964); *Williams v. RHG Publishing,* 7 Med.Law Rptr. 1372 (N.Y. Sup.Ct., 1981). The District Court was equally mistaken in its interpretation of California law. *See, McGuiness v. Motor Trend Magazine,* 129 C.A.3d 59 (1982).

The District Court's mistakes of law were of constitutional dimension. The court acted arbitrarily and unreasonably in holding that California's short one-year statute of limitations for libel and invasion of privacy began to run for purposes of the Uniform Single Publication Act before the offending book was published in California, and before it was available for sale in bookstores throughout the nation. It is clear that prior to California's enactment of the Uniform Single Publication Act, California's Code of Civil Procedure § 340(3) would not have barred petitioners' action. The Uniform Single Publication Act was designed to offer protection to the press from countless suits. It was not its purpose to protect the press from a single suit. The conclusion reached by the courts below has yielded a result which is unduly harsh and unsupported by any policy considerations. As construed below, California's statute of limitations began to run against petitioners before they knew, or could have known, that their rights

were violated. As a result petitioners were arbitrarily stripped of their cause of action, a valuable property right. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

The irrationality of the decisions below is underlined by the fact that had petitioners filed their lawsuit in a state or federal court in Pennsylvania on November 16, 1979, the action would *not* have been time barred. Similarly, had petitioners filed their action on November 16, 1979 in a federal or state court in New York, the court would have entertained their action.

In sum, petitioners have been denied substantive due process of law in violation of the Fifth Amendment to the United States Constitution.

B.

In the case at bar, the Ninth Circuit virtually abdicated its appellate jurisdiction, stating that it would accept the District Court's conclusion that petitioners' cause of action accrued prior to November 16, 1978 "unless it is found to be 'clearly erroneous.' " Article III, § 2[1] of the Constitution affords the federal courts the power, and imposes on them the duty, to decide all cases between citizens of different states. *See also*, 28 U.S.C. § 1332(a)(1). The Court of Appeals engaged in a form of unjustified abstention when it declined to review the District Court's conclusions of law in this case. *Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943) ("[D]iversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. . . . In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred. . . it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.") Subsequent to *Meredith*, the Court

stated that the problem of ascertaining the state law may often be difficult, but that "is not a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case properly before it." *Williams v. Green Bay & W.R. Co.*, 326 U.S. 549, 553 (1946).

In our constitutional hierarchy, the Court of Appeals, of course, is higher than the District Court. Pursuant to its power to create inferior courts, Congress enacted the Circuit Courts of Appeal Act, which created an intermediate Court of Appeals below the Supreme Court. 28 U.S.C. § 43a. The Court of Appeals has jurisdiction of appeals from all final decisions of the District Court (28 U.S.C. § 1291), and has the duty to decide whether a District Court correctly decided questions of law in a diversity case. The Court of Appeals, like this Court, should not abandon its constitutional obligation - its duty and not simply its province - "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803); *United States v. Nixon*, 418 U.S. 683, 705 (1974).

Petitioners are aware, of course, that there is a body of law holding that an interpretation of local law by federal judges experienced therein should be given appropriate weight. The interpretation of the Uniform Single Publication Act, however, is hardly a question of local law, and the District Judge was not shown to have any special experience which might otherwise justify the Court of Appeals subordinating itself to an inferior tribunal. The Ninth Circuit does not regularly defer to a District Court in diversity cases. In *United States v. Gutterman*, 701 F.2d 104 (9th Cir. 1983), the court reversed a District Court, finding that California's statute of limitations had not run. *No* deference was given to the District Court's construction of California law.

The failure of the Ninth Circuit to fully review the difficult questions of law decided by the District Court

deprived petitioners of their property without due process of law guaranteed by the Fifth Amendment. In *Logan v. Zimmerman Brush Co., supra*, the Court held that a cause of action is a property right which cannot be stripped from a party without due process of law. The Court held that the "process" that was "due" petitioner was "established adjudicatory procedures." In the case at bar, the "process" due petitioners is the established procedures pursuant to which the Court of Appeals fully reviews questions of law decided by the District Court. It is axiomatic that the standard of review utilized by an appellate court determines the outcome of the litigation. *See, Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *United States v. Singleton*, 702 F.2d 1159 (D.C. Cir. 1983). In *Singleton*, the court concluded that it was not permitted to defer to the District Court's assessment of the sufficiency of the evidence in granting a post-verdict motion for acquittal, stating:

> We have a responsibility to ensure that the Government's right to appeal is not an empty one; we must conduct our review of Government appeals with the same care afforded appeals by defendants.

702 F.2d at 1163.

Petitioners submit that the Court of Appeals for the Ninth Circuit gave them merely an "empty" appeal when it improperly invoked the "clearly erroneous" standard in reviewing the *legal* questions presented to it. In doing so, the court deprived petitioners of procedural due process of law in violation of the Fifth Amendment to the United States Constitution.

II

CALIFORNIA CODE OF CIVIL PROCEDURE § 340(3), AS CONSTRUED BY THE FEDERAL COURTS BELOW, OFFENDS TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

California Code of Civil Procedure § 340 (3) provides that an action for libel shall be brought within one year. Prior to California's adoption of the Uniform Single Publication Act, each communication of a defamatory statement created a separate cause of action. With the development of mass media, such a rule became anachronistic because it created the possibility that a single defamatory statement would give rise to millions of causes of action. It was to prevent this evil that California enacted its version of the Uniform Single Publication Act. Section 3425.3 reads in relevant part:

> No person shall have more than one cause of action for damages for libel. . . such as any one. . . book . . . . Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

Section 3425.4 reads in relevant part:

> A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication. . . shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication.

Neither the wording of the statute nor the policy behind it requires a holding that the period of limitations begins to

run from the time of the first publication. *Dominiak v. National Enquirer, supra*, 266 A.2d at 629. "To fix the accrual date *prior* to receipt by the public of the libelous material . . . is normally to begin the running of the statute of limitations before the time that the offending publication has been brought to the victim's attention, and, indeed prior to the occurrence of any harm to his reputation. The result, thus, is an effective shortening of an already short limitation period." *Zuck v. Interstate Publishing Corp., supra*, 317 F.2d at 731 (emphasis in original).

Petitioners submit that the federal courts below acted arbitrarily, and unreasonably, in construing California Code of Civil Procedure 340(3) as starting to run prior to November 16, 1978, before the time that the offending book caused them any harm, and prior to the time that they knew, or could reasonably have known, of the existence of the book. Just as due process requires that the defendants be given adequate notice of a suit (*Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313-314, (1950)) so also does due process require that a statute of limitations not bar plaintiff's cause of action for libel when a plaintiff cannot know of the existence of the libel. *See, World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). At bottom, § 340(3), as construed by the federal courts below, violates the Due Process Clause of the Fourteenth Amendment because it offends traditional notions of fair play and substantial justice.

The Court of Appeals declined to consider petitioners' contention that § 340(3) as construed and applied violated the Due Process Clause because, allegedly, petitioners did not make that contention in the District Court. Although petitioners did not explicitly invoke the Fourteenth Amendment in the District Court, they continuously argued that the respondents' interpretation of

§ 340(3) - which the District Court ultimately adopted - was unreasonable and arbitrary. It is not always necessary to use "magic words" to invoke constitutional rights. Moreover, appellate courts on occasion address questions raised for the first time on appeal when they involve due process implications. *Malandus v. Merrill, Lynch etc.*, 703 F.2d 1152, 1173 (10th Cir. 1983).

III

CONTRARY TO THE CONCLUSION REACHED BY THE FEDERAL COURTS BELOW, UNDER CALIFORNIA LAW THE PERIOD OF LIMITATIONS FOR PURPOSES OF THE UNIFORM SINGLE PUBLICATION ACT DOES NOT BEGIN TO RUN PRIOR TO THE DATE ON WHICH THE BOOK WENT ON SALE TO THE PUBLIC AT BOOKSTORES THROUGHOUT THE NATION.

McGuiness v. Motor Trend Magazine, 129 C.A.3d 59 (1982) was decided after the District Court rendered its judgment in this case. *McGuiness* is clearly in conflict with the District Court's conclusion that "national distribution" is not required to start the California Statute of Limitations running for purposes of the Uniform Single Publication Act. In that case, the complaint was filed on July 29, 1976. The libelous statement appeared in the issue that was dated August 1975. According to the uncontradicted affidavits, the August 1975 issue was distributed to subscribers and to newsstands for sale to the public no later than July 24, 1975, in accordance with the magazine's general policy. The "on sale date" of the issue was July 24, 1975, and the magazine's contract with its distributor, Curtis Circulating Company, required that the issue reach retailers no later than July 23, 1975. The magazine had a regular monitoring system to check the effectiveness of the Post Office in delivering publications to subscribers, and the *sampling* showed that the issue

reached subscribers in Florida, Iowa, New York and Washington on July 19, July 22, July 18, and July 17, 1975.

The court concluded that a "general distribution of the publication to the public" had occurred because the magazine was in the hands of retailers throughout the nation prior to July 29, 1975, and had been widely circulated to the public at large prior to that date. *McGuiness* clearly had the "national distribution" rule in mind when it held that a general distribution of the publication to the public had occurred, since it cited *Zuck v. Interstate Publishing Corp., supra,* and *Khaury v. Playboy Publications, Inc.*, 430 F.Supp. 1342 (S.D. N.Y. 1977).

In *Khaury* plaintiff filed his libel action on September 22, 1976, resulting from the publication of an article appearing in the October 1975 issue of *Oui* Magazine. Defendants moved for summary judgment claiming that the action was barred by the statute of limitations. They showed by affidavit that September 4, 1975 was designated as the on-sale date of the magazine; that a total of 1,779,990 copies were distributed to the public; of these 1,499,845 were newsstand copies, 87,190 were by subscription and the balance of the copies were distributed abroad or as complimentary issues. With respect to the newsstand copies, the magazines were delivered to common carriers in Illinois during the week of August 12, 1975, for shipment to the wholesale dealers who customarily deliver copies to retailers within 3 days before or after the on-sale date [September 4, 1975]. The retailers, in the ordinary course of business, offered the copies to the public upon receipt. In the New York area, delivery to the retailers was completed by September 7, 1975, more than two weeks prior to the "critical" date. The subscription copies were delivered to the United States Postal Service between

August 13 and August 19, 1975. In the normal course, these copies would reach subscribers within five days of mailing.

The *Khaury* court, citing *Zuck*, and *Osmers v. Parade Publications, Inc., supra*, held that by September 22, 1975 the statute of limitations had begun to run, for purposes of the single publication rule, because by that date it was in the hands of a large number of subscribers, and on display for sale in newsstands throughout the nation. In explaining *Osmers* the court stated:

> Here defendants do not contend that the legal publication date, triggering the running of the statute of limitations, should be deemed the date of sale of a few advance copies prior to the general release date. Rather, September 7, 1975 is precisely 'the same as the date on which the bulk. . . went on sale to the public at newsstands throughout the United States;' indeed, of the total 1,779,990 distributed 1,587,035 copies were available to the public by that date. Since plaintiffs' suit was brought more than one year after this date, it is barred by the statute of limitations.

(430 F.Supp. at 1345)

Petitioners called *McGuiness* to the attention of the Ninth Circuit, asserting that it supported their contention that national distribution was required. The court ignored this aspect of *McGuiness*, but cited it to support its rejection of petitioners' argument that petitioners' cause of action did not accrue until the book arrived in California, petitioners' residence, where the damage is greatest. (A10) There is not a word in the *McGuiness* opinion to support the Ninth Circuit's assertion that the California statute of limitations began to run even though the

magazine had not been on sale to the public in California. The *McGuiness* court did not mention California when it referred to Florida, Iowa, New Jersey and Washington simply because it was so obvious that since the magazine was on sale to the public at newsstands throughout the United States by July 24, 1975, it had gone on sale throughout California by July 29, 1975. Respondents' brief in *McGuiness* (p. 16) makes it abundantly clear that the contested issue of the magazine had in fact been distributed in California prior to July 29, 1975. Citing *Dominiak v. National Enquirer, supra*, respondent Motor Trend Magazine argued that it makes no difference what rule is applied since "all events occurred more than one year before the commencement of the action." *Dominiak* held, at a minimum, "that the first publication of the alleged defamation *in the state in which suit is brought* should . . . mark the date from which the statute runs." 266 A.2d at 631. (emphasis added)

IV.

THE FEDERAL COURTS BELOW FAILED TO FOLLOW CALIFORNIA LAW HOLDING THAT THE REPRINTING OF A BOOK CAUSES THE STATUTE OF LIMITATIONS TO START RUNNING FROM THE DATE OF REPRINTING.

The undisputed evidence shows that Harper & Row had five additional printings of the hardcover book after November 16, 1978, containing the offending statements about petitioners.[2] California law holds - with reasonable clarity - that each reprinting of the book started the statute of limitations running again.

In *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 43 C.A.3d 880, 892-896 (1974) the court stated at footnote

[2]When the paper edition was published, petitioners' names were eliminated.

14: "California has adopted the Uniform Single Publication Act, Civil Code Section 3425.3 . . . . Therefore, the cause of action for invasion of privacy accrued upon the initial distribution of the textbook. [Citation]. However, it should be pointed out that if defendants reprint the textbook they may cause the statute of limitations to start running again from the date of reprinting. *See* Ann. 42 A.L.R.3d 807, 828-829) Since there is no evidence to indicate that the textbook was reprinted, we need not reach this issue." In *Kanarek v. Bugliosio*, 108 C.A.3d 327 (1980) the court repeated the above quotation and added: "To the same effect see *Wheeler v. Dell Publishing Co.*, (7th Cir. 1962) 300 F.2d 372; *Gregoire v. G.P. Putnam Sons* (1948) 298 N.Y. 119." (108 C.A.3d at 332). In *Wheeler v. Dell Publishing Co.*, the court stated: "Dell . . . claims the benefit of the [single publication] rule, and if it applies in the way [Dell] contends, the statute of limitations would run from April 7, 1959, the date of first publication. . . . We think the rule does not apply to embrace in the April 7, 1959 printing the several reprintings by Dell thereafter. For that reason, we conclude that Hazel Wheeler's cause is not barred as to the reprintings within one year next prior to June 10, 1960." (300 F.2d at 375). The court stated that there was no need to attempt to distinguish between a reprinting and a new edition, because the significant factor is the repeating of the defamation. "It makes little essential difference to a defamed person whether the material is a new paperbound edition of an original publication or a new printing of the paperbound, if the defamation is repeated. What matters is the new wound to reputation by the new defamation. A libel is a written slander. Just as each repetition of the slander is actionable, so saying it again in writing is actionable." *Id.* The court pointed out that the reprintings were not "miscellaneous copies" of the original printing,

but were the result of a "conscious act." Discussing *Gregoire v. G.P. Putnam Sons*, 298 N.Y. 119 (1948), the court stated: "There, suit was based on a single copy of a book sold a year after first publication. . . . The single book was *part of the first printing* and is well within the 'miscellaneous copies' rule. Single books and miscellaneous copies are part of the original publication. There is no new conscious act. They are like echoes of spoken defamation." (300 F.2d at 375) (Emphasis added)

The courts below concluded, however, that the five separate printings of the hard cover edition of the book, printed after November 16, 1978, did not save petitioners' cause of action. The Court of Appeals stated:

> The District Court . . . held that the continued printing of the book in *1979* was part of the single, integrated publication. . . . If all printings were part of the first hard cover edition of the book, the printings are a single publication.

(A9) (emphasis added) The California cases point in the opposite direction.

CONCLUSION

For the aforesaid reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

STANLEY FLEISHMAN
A Professional Corporation

By: _____

STANLEY FLEISHMAN
Attorney for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

FEB 9 1983

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

DARCIA M. FLEURY, DONALD L. FLEURY, SUSAN ADELE FLEURY, and DARLEEN ANN FLEURY,

Plaintiffs-Appellants,

vs.

HARPER & ROW, PUBLISHERS, INC., a foreign corporation; MANNITOU ENTERPRISES UNLIMITED, INC., a foreign corporation; and LINDA GOODMAN,

Defendants-Appellees.

No. 81-5830

O P I N I O N

Appeal from the United States District Court
for the Southern District of California
Howard B. Turrentine, Chief District Judge, Presiding
Argued and submitted, September 7, 1982

Before: ELY and CHOY, Circuit Judges, and
THOMPSON,* District Judge

THOMPSON, District Judge:

This is a diversity action for invasion of privacy, libel, intentional infliction of emotional distress and injunctive relief (stated in four separate claims for relief), arising

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* Honorable Bruce R. Thompson, Senior United States District Judge, District of Nevada, sitting by designation.

from the publication by defendants of the book "Love Signs" authored by defendant Linda Goodman. The district court's jurisdiction was predicated on 28 U.S.C. § 1332 (a). The appeal is from an order of the district court granting summary judgment for defendants, and a subsequent order denying a motion to alter or amend upon the ground that the causes of action are barred by the statute of limitation. Appellate jurisdiction is predicated on 28 U.S.C. § 1291.

The undisputed facts of record are that Harper & Row Publishers, Inc. intended that "Love Signs" would be a major publication for the 1978 Christmas trade. The author completed the manuscript by late summer 1978. Harper & Row in the spring or early summer of 1978 published its "Fall August through December 1978" list in which Linda Goodman's "Love Signs" was featured for release in November 1978. The August 28, 1978 issue of Publisher's Weekly, the professional journal for trade publishing, contained an announcement that "Love Signs" would be available in November 1978. The issue of the same magazine, dated November 13, 1978, which was placed in circulation approximately a week before the date on the publication, contained a review of "Love Signs" and announced its availability in November.

The release date for the book announced by Harper & Row was November 9, 1978. This was the date when the publisher ordered the release of the book in accordance with trade practice for distribution through shippers for delivery to dealers and distributors for sale. Shipments commenced from the warehouse situated in Scranton, Pennsylvania on November 10, 1978. On that date, approximately 10,000 copies were shipped, and by November 14, 1978, approximately 30,000 copies had been shipped from the warehouse to bookstores throughout the United States.

Books were displayed and on sale at the public bookstore in the Harper & Row Building, 10 East 53rd Street, New York City, on and after November 13, 1978. They were also displayed for sale in the major bookstores on Fifth Avenue before November 16, 1978. An author's party was held in the Harper & Row offices on November 14, 1978, which was attended by between 30 and 50 persons, many of whom received autographed copies of the book.

The shipping documents show a shipment of 50 books by air freight to Rochester, Minnesota on November 10, 1978. The bulk of the shipments were made by truck carrier. Deliveries to New York City are normally accomplished in one day. Shipments to the West Coast normally take about two weeks. By November 14, 1978, substantial shipments had been made to distributors and bookstores in New York, Michigan, California, Illinois and Florida.

There is no evidence that a copy of "Love Signs" had been received in California by November 16, 1978. The official publication date for the book, selected by the author Linda Goodman, was December 25, 1978, and this was the date given to the copyright office and the date used by most reviews of the book.

This action was commenced on November 16, 1979.

The parties identified three states whose laws might control the disposition of the case, Pennsylvania, New York, and California. All three have adopted the single publication rule, Pennsylvania and California by statute, and New York by court decision. Each of the three states has a one-year statute of limitation governing this type of action. The district court made no choice of law, opining that it was unnecessary inasmuch as the law of the three states is the same. This conclusion is not necessarily correct, however, inasmuch as Pennsylvania has inter-

preted its single publication statute to permit the plaintiff to select any delivery or sale of a book as the offending publication and collect damages for injuries to reputation suffered for one year thereafter. *Dominiak v. National Enquirer,* 439 Pa. 222, 266 A.2d 626 (1970). Hence, we deem it appropriate to make a choice of law.

In a diversity case the federal court must apply the conflict of law rules that the forum state would apply. *Klaxon Co. v. Stantor Electric Manufacturing Co.,* 313 U.S. 487, 61 S.Ct. 1020 (1941). California has adopted the "governmental-interest approach" in preference to the traditional dogma in tort cases of applying the law of the place where the tort was committed. The modern conflicts philosophy is elucidated in two opinions of the California Supreme Court: *Reich v. Purcell,* 67 Cal.2d 551, 432 P.2d 727 (1967); *Hurtado v. Superior Court of Sacramento County,* 11 Cal.3d 574, 522 P.2d 666 (1974). *See also, Ashland Chemical Co. v. Provence*, 129 Cal.App.3d 790, 181 Cal.Rptr. 340 (1982). To make a choice of law the court examines the policy underlying the laws of the involved states to determine which states are "interested" in having their laws applied to the issue in question. A state will have an interest in having its law applied if the policies underlying the law would be thereby advanced. Libel and invasion of privacy are transitory torts to which the law of the forum will normally be applied absent a strong governmental interest of another jurisdiction. Pennsylvania is merely the state where the books were warehoused. None of the parties resides there and Pennsylvania has no interest in having its single publication rule applied to this case. California is the state where all the plaintiffs were domiciled throughout the transactions involved, and the state where the major damage to their privacy and reputations should have occurred. Inasmuch as it is the forum state, application of its laws is preferred.

Kasel v. Remington Arms Co., 24 Cal.App.3d 711, 101 Cal.Rptr. 314 (1972). Defendant Harper & Row has its place of business in New York City, and the state of New York has an interest in having its laws applied for the protection of its residents against multiplicity of suits and the pressing of stale claims, but inasmuch as the laws of the state of New York are identical with those of California, there is no reason to reject the law of the forum. Hence the laws of California are applicable to the resolution of this case. 12 Cal.Jur.3d, Conflict of Laws, § 19, pp. 498-500; Annot. 58 A.L.R.2d 650, 652 (1958).

McGuire v. Brightman, 79 Cal.App.3d 776, 145 Cal.Rptr. 256 (1978), is an instructive case involving the dissemination of a libel in South Dakota, where the plaintiffs resided. A default judgment was obtained in South Dakota after defendant had been served under South Dakota's long-arm statute. Enforcement of the judgment was sought by action in California and the issue presented was whether the South Dakota court had *in personam* jurisdiction of the defendant. The court affirmed the validity of the South Dakota judgment and discussed at length the decision in *Anselmi v. Denver Post, Inc.*, 552 F.2d 315 (10th Cir. 1977), saying in part:

> The court's first step in *Anselmi* was to examine Wyoming law. That examination revealed that Wyoming would probably not follow the single publication rule if the issue were presently raised. *Anselmi* took the further step, however, of asking whether, even assuming the single publication rule were applied in Wyoming, it would apply to preclude jurisdiction over out of state publishers sending libelous material into the forum state. Relying upon Judge Friendly's decision in *Buckley v. New York Post Corporation* (2d Cir. 1967) 373 F.2d 175, the changes

> made to the Restatement, and other authority, the *Anselmi* court concluded that whatever the single publication rule's value in preventing multiplicity of actions and almost endless tolling of the statute of limitations, it would be improperly applied if used to prevent suit in the state of the plaintiff's residence for libel appearing in a newspaper published in a distant state. This conclusion was further supported by the difficulty in reconciling use of the single publication rule with the long-arm statute for torts, since the essence of defamation is injury to the reputation of the plaintiff in his home area where he is known.

McGuire v. Brightman, Id. at 261-262.

Having concluded that the law of California governs this case, we are aided by the principle that substantial deference should be accorded the district judge's interpretation or construction of the law of the state in which he sits.

This standard was discussed in *Gaines v. Haughton*, 645 F.2d 761 (9th Cir. 1981). The opinion reads, in part:

> Ordinarily, an appellate court can freely review questions of law. *Miller v. United States*, 587 F.2d 991, 994 (9th Cir. 1978). However, when a federal court is in the position of interpreting state law with no definitive guidance from the state's highest court, *see Commissioner v. Estate of Bosch*, 387 U.S. 456, 465, 87 S.Ct. 1776, 1782, 18 L.Ed.2d 886 (1967), we accord "substantial deference" to the district judge's interpretation or construction of the law of the state in which he sits. *Kabatoff v. Safeco Ins. Co. of America*, 627 F.2d 207, 209 (9th Cir.

> 1980); *Associated General Contractors v. San Francisco Unified School District*, 606 F.2d 1381, 1384 (9th Cir.), *cert. denied*, ____U.S.____, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980); *Lewis v. Anderson*, 615 F.2d 778, 781 (9th Cir. 1979), *cert. denied*, ____U.S.____, 101 S.Ct. 206, 66 L.Ed.2d 89 (1980); *Mesa Oil Co. v. Business Men's Assurance Co. of America*, 476 F.2d 491, 494 (9th Cir.), *cert. denied*, 414 U.S. 1003, 94 S.Ct. 358, 38 L.Ed.2d 239 (1973). The District Court's construction of state law will be accepted on review unless it is "clearly wrong" or "clearly erroneous." *Gee v. Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir. 1980); *Owens v. White*, 380 F.2d 310, 315 (9th Cir. 1967).

Id. at 770. In the present case, the district court held that, under California law, the cause of action for libel accrued prior to November 16, 1978. This determination will be accepted on review unless it is found to be "clearly erroneous."

We have found no decision of the California Supreme Court bearing on the issues, and counsel have cited none. In cases where jurisdiction rests on diversity of citizenship, federal courts must follow the decisions of intermediate state courts in the absence of convincing evidence that the highest court of the state would decide differently. *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940); *American Triticale, Inc. v. Nytco Services Co.*, 664 F.2d 1136 (9th Cir. 1981).

The Fleurys' libel claim is based on a discussion of their family life which appeared in the book "Love Signs." At common law each copy of this book would give rise to a distinct and separate cause of action, resulting in a multiplicity of suits and an almost endless tolling of the statute of limitation. 50 Am.Jur.2d, Libel and Slander,

§ 153 (1970). To prevent this, California has adopted the Uniform Single Publication Act, Civil Code 3425.1 - 3425.5.[1] The text of the California statute is identical with the uniform act proposed in 1952 by the National Conference of Commissioners on Uniform State Laws, 14 U.L.A. 351 (1980), except that in Civil Code § 3425.3 the California legislature substituted the word "issue" for the word "edition." It has been said that this change was made in reliance upon the opinion of the New York Court of Appeals in *Gregoire v. G.P. Putnam's Sons*, 288 N.Y. 119, 81 N.E.2d 45 (1948).[2] *See*, 62 Am. Jur2d., Privacy § 46, p. 751 n. 4 (1972). In the *Gregoire* case it was held that an action commenced July 2, 1946 was barred by the one-year statute of limitation when the book in question was first published in November 1941, although there had been sales of sixty books from stock within the year preceding the action. The Commissioner's prefatory note to the uniform act states: "The intention is to adopt the rule as it has been developed at common law in the states which have accepted it." New York is one of such states.

In the case of a single, integrated publication, a cause of action accrues on the first general distribution of the publication to the public. *McGuiness v. Motor Trend Magazine*, 129 Cal.App.3d 62, 180 Cal.Rptr. 784, 785 (1982); *Kanarek v. Bugliosi*, 108 Cal.App.3d 332, 166 Cal.Rptr. 526, 529 (1980); *Johnson v. Harcourt, Brace, Jovanovich, Inc.*, 43 Cal.App.3d 880, 118 Cal. Rptr. 370, 382 (1974); *Belli v. Roberts Brothers Furs*, 240 Cal. App.2d. 284, 49 Cal.Rptr. 625 (1966);[3] Cal. Practice Vol. 14, § 231:15; Annot., 42 A.L.R.3d 807 (1972); 6 Cal.Jur.3d, Assault and Other Wilful Torts, § 261, p. 464.

A cause of action for defamation does not arise until there has been an unprivileged publication of the libel to a third party. Restatement (Second) of Torts § § 558, 577,

Cal. Civ. Code § 45 (West); 6 Cal.Jur.3d, Assault and Other Wilful Torts, § 132, p. 337. The one-year limitation period applies to actions for invasion of privacy as well as for defamation. *Cain v. State Farm Mutual Automobile Insurance Company*, 62 Cal.App.3d 310, 132 Cal.Rptr. 860 (1976).

The district court held that the publication of "Love Signs" was a single, integrated publication which was generally distributed to the public by the shipment of thirty thousand copies from the warehouse in Pennsylvania by November 14, 1978, and their display, delivery, communication and sale in New York City on and before November 14, 1978. One need only ask himself the question: "If this action had been commenced on November 14, 1979, would it have been prematurely brought"? The obvious answer is "no," inasmuch as all the requirements for the accrual of the cause of action had been met on that date. Restatement (Second) of Torts, § 558.

The district court also held that the continued printing of the book into 1979 was part of the single, integrated publication. Appellants contend that the new printings were a republication. This argument is without merit. If all printings were part of the first hardcover edition of the book, the printings are a single publication. *Kanarek v. Bugliosi, supra*. This result is particularly clear in California where the work "issue" was substituted for "edition" to accomplish this particular result. *Belli v. Roberts Brothers Furs, supra*; *Gregoire v. G.P. Putnam's Sons, supra*; Eldredge, The Law of Defamation, § 38, n. 36, at p. 213 (1978).

Plaintiffs contend that they are entitled to rely on December 25, 1978, the date selected by the author, as the date of publication, and that defendants are "estopped." This is not the law. The precedents with almost complete uniformity hold that publication occurs at the time of

actual communication of the libel, not the date on the cover of the newspaper, magazine or other printed matter. *McGuiness v. Motor Trend Magazine, supra*; *Belli v. Roberts Brothers Furs, supra.*

Plaintiffs also suggest that the correct rule should be that the cause of action does not accrue until communication of the libel in the place of plaintiffs' residence where the damage impact is greatest. California has rejected this suggestion. *McGuiness v. Motor Trend Magazine, supra*, was an action where communication of the publication only in Florida, Iowa, New Jersey and Washington was proved, yet the action by the California plaintiff brought on July 19, 1976 was held barred by limitations because of distribution to subscribers in those states on and prior to July 22, 1975.

It is also the California rule that the statute of limitations will run on a libel action even if plaintiff does not realize that he has been defamed. *Johnson v. Harcourt, Brace, Jovanovich, Inc., supra.*

Plaintiffs believe that the Pennsylvania Supreme Court in *Dominiak v. National Enquirer, supra*, has given the most thoughtful and defensible interpretation to the single publication statute. We do not agree. In the first place, the Pennsylvania court ignored the difference between the word "action" and the phrase "cause of action" and viewed the single publication act as if it says: "No person shall have more than one action for damages for libel, or slander or invasion of privacy" in preference to the correct text: "No person shall have more than one *cause of action* for damages, etc." (emphasis supplied). Secondly, the Pennsylvania decision ignores the second of the two prime reasons for the single publication rule: to avoid multiplicity of action and to stop the endless tolling of the statute of limitations. If we read *Dominiak* correctly, the statute of limitations never runs so long as there is a new

communication of the libel. This interpretation emasculates the rule.

Plaintiffs also have argued in the district court and here that the "rule of discovery" inures to their benefit, that is to say, that "the cause of action does not accrue until a plaintiff knows, or should know, all material facts essential to show the elements of that cause of action." *Neal v. Magana, Olney, Levy, Cathcart & Gelfaud*, 6 Cal.3d 176, 491 P.2d 421, 430 (1971). Reliance is placed upon *Cain v. State Farm Mutual Automobile Insurance Company*, 62 Cal.App.3d 310, 132 Cal.Rptr. 86 (1976), a right of privacy case, and *Manguso v. Oceanside Unified School District*, 88 Cal.App.3d 725, 152 Cal.Rptr. 27 (1979), for application of the rule of discovery to the instant case. This same proposition was placed before the court in *McGuiness v. Motor Trend Magazine, supra*. Neither *Cain* nor *Manguso* involved the interstate communication of a libel implicating the single publication act, and the McGuiness court had little difficulty in rejecting the rule of discovery, finding it inapplicable to this type of case.[4]

On appeal the plaintiffs say that the California Code of Civil Procedure, § 340(3), as construed by the court, denied them due process of law because the statute began to run against them when they did not know and could not know of the publication of the book. This contention was not made in the district court, not even on plaintiffs' motion to alter or amend the judgment (from which the appeal was taken), and will not be considered for the first time on appeal. *Hormel v. Helvering*, 312 U.S. 522 (1941); *Frommhagen v. Klein*, 456 F.2d 1391 (9th Cir. 1972); *Hammerquist v. Clarke's Sheet Metal, Inc.*, 658 F.2d 1319 (9th Cir. 1981).

Finally, on an overall basis and in support of each of the contentions of fact and law that have been discused,

plaintiffs insist that the least that can be said is that the factual posture of this case presents disputed issues of material fact which precluded the entry of a summary judgment. They argue, in substance, that the issue "When did plaintiffs' cause of action accrue?" is the issue of fact which a jury is entitled to determine. *See, Budd v. Nixon,* 6 Cal.3d 195, 491 P.2d 433 (1971). This implies that all the facts which have been recited, including, for examples, the author's selection of December 25th as the publication date, the absence of proof of any communication of the libel before November 16th in the geographic area of plaintiffs' residence, the printing of additional copies of the first issue of the book in early 1979, and all the other undisputed facts, should be given to the jury in a bundle to let the jury decide if the statute had run. This cannot be correct. We repeat, all the evidentiary facts are without material dispute in an extensive record. Under these circumstances, the question of when the cause of action accrued, is a question of law. We have given the reasons why under California law, if this same evidence should be presented to a jury, the duty of the court would be to direct a verdict for the defendants because of the bar of the statute of limitations.

Affirmed.

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[1] § 3425.3 One cause of action; recovery

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jursidictions.

§ 3425.4 Judgment as bar

A judgment in any jurisdiction for or against the plaintiff upon the substantive merits of any action for damages founded upon a single publication or exhibition or utterance as described in Section 3425.3

shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication or exhibition or utterance.

[2]"Recognizing that radical changes have been brought about by modern methods of disseminating printed matter for which there is a widespread demand, and desiring to avoid multiplicity of suits and to give effect to statutes of limitation, adjudicated cases disclose that within recent years courts of this State and other jurisdictions have ruled that the publication of a defamatory statement in a single issue of a newspaper, or a single issue of a magazine, although such publication consists of thousand of copies widely distributed, is, in legal effect, one publication which gives rise to one cause of action and that the applicable Statute of Limitation runs from the date of that publication. Wolfson v. Syracuse Newspapers, Inc., 254 App.Div.211, 4 N.Y.S.2d 640, affirmed 279 N.Y. 716, 18 N.E.2d 676; Hartmann v. Time, Inc., Sup., 60 N.Y. S.2d 209, 210, 211, affirmed 271 App.Div. 781, 66 N.Y.S.2d 151; Age-Herald Pub. Co. v. Huddleston, 207 Ala. 40, 43, 92 So. 193, 37 A.L.R. 898; Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So.2d 344, 347, 148 A.L.R. 469; Julian v. Kansas City Star Co., 209 Mo. 35, 71, 72, 107 S.W. 496; Windrod v. Time, Inc., 334 Ill.App. 59, 78 N.E.2d 708; Hartmann v. Time, Inc., D.C., 64 F.Supp. 371, 678-680; and see Id., 3 Cir., 166 F.2d 127, 133, 134; McGlue v. Weekly Publications, Inc., D.C., 63 F.Supp. 744; Cannon v. Time, Inc., D.C., 39 F.Supp. 660; Backus v. Look, Inc., D.C., 39 F.Supp. 662; Means v. MacFadden Publications, Inc., D.C., 25 Supp. 993." *Gregoire v. G.P. Putnam's Sons*, at p. 47.

[3]"It has generally been held that, in the case of a single, integrated publication, the cause of action based upon objectionable matter appearing in the publication accrues upon the first general distribution of the publication to the public." *Belli v. Roberts Brothers Furs*, at p. 629.

[4]"Plaintiff next contends that a 'rule of discovery' should apply, citing *Manguso v. Oceanside Unified School Dist.*, 88 Cal.App.3d 725, 728-731, 152 Cal.Rptr. 27, and *Tom Olesker's Excit. W., etc. v. Dun & Bradstreet, Inc.* (1975 61 Ill. 2d 128, 334 N.E.2d 160. These cases are readily distinguishable. In *Manguso* the libel was in a letter which was placed by a supervisor in the plaintiff's confidential permanent personnel file, of which the plaintiff did not learn for 16 years. In *Olesker*, the libel was a credit report distributed to a subscriber on a confidential basis. In those cases the libel was committed in an inherently secretive manner. They have no application to a public libel in a nationally distributed magazine widely available to the public, including

the plaintiff. Unlike *Manguso* and *Olesker*, there was no concealment of the defamation. (Johnson v. Harcourt, Brace, Jovanovich, Inc., 43 Cal.App.3d 880, 896, 118 Cal.Rptr. 370.)" *McGuiness v. Motor Trend Magazine*, at p. 786.

A15

JUL 1 - 1981
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DARCIA M. FLEURY, DONALD L. FLEURY, SUSAN ADELE FLEURY, and DARLEEN ANN FLEURY,

Plaintiffs,

Civil No. 79-1851-T

O R D E R

v.

HARPER & ROW, PUBLISHERS, INC., a foreign corporation; MANNITOU ENTERPRISES UNLIMITED, INC., a foreign corporation; and LINDA GOODMAN,

Defendants.

Defendants are the publisher, author, and copyright holder of a book titled "Love Signs," which deals with astrology. Plaintiffs are mentioned in the book. Their complaint alleges the torts of invasion of privacy, libel, and intentional infliction of emotional distress.

Defendants move for summary judgment (F.R.Civ.P. Rule 56), arguing that the complaint was not filed within the time period provided in the statute of limitations. Although the parties have not briefed which state's law controls in this diversity action, the court sees no significant difference between the laws of the three relevant states. The book was printed and shipped in Pennsylvania, sold initially in New York where defendants are located, and later was received by plaintiffs in California where they reside. All three states have a one year statute of

limitations for this type of lawsuit. *See* Cal. Civ. Proc. Code § 340(3); N.Y. Civ. Prac. Law § 215(3); 12 Pa. Cons. Stat. § § 31-32.

The complaint was filed on November 16, 1979. Pursuant to the one year statute of limitations, the cause of action must not have accrued prior to November 16, 1978. Defendants argue that the uncontroverted affidavits on file demonstrate that plaintiff's claim arose prior to November 16, 1978.

The three relevant states have adopted the "single publication rule," either by statute or by judicial decision. *See* Cal Civ. Code § § 3425.1 - 3425.5; 12 Pa. Cons. Stat. § § 2090.1 - 2090.5; *Gregoire v. G.B. Putnam's Sons*, 298 N.Y. 119, 81 N.E. 2d 45 (N.Y. Ct. App. 1948). Under this rule a party has only one cause of action for libel, invasion of privacy, or any other tort arising out of any single publication of a book. The plaintiff may recover the damages suffered in all jurisdictions. *Id*; *Eliah v. Ucaton Corp.*, 433 F.Supp. 309, 312-13 (W.D. N.Y. 1977).

Defendants' affidavits indicate that the Harper & Row warehouse in Scranton, Pennsylvania was instructed to release the book on November 9, 1978. Shipments to wholesalers, distributors, and bookstores throughout the United States began on November 10, 1978, with approximately 10,000 copies shipped. On November 13, 10,000 more copies were shipped, with an additional 10,000 on November 14.

New York bookstores normally received books one working day after shipment. The Harper & Row Bookstore in New York received approximately 375 copies on Monday, November 13. They distributed some of the books internally, and placed the remainder on their shelves and on prominent display for public sale that day. Harper & Row held an author's party for 30-50 people on

November 14, giving complimentary copies to many of the guests.

Plaintiffs contend, in part, that the publication date of December 25, 1978 used for publicity purposes should control as the date upon which the claim arose. However, it is a common practice to actually release publications weeks before their so-called "official" publication date. The "official" date is irrelevant in determining when publication of the book occurred. *See Khaury v. Playboy Publications, Inc.*, 430 F. Supp. 1342, 1344 (S.D. N.Y. 1977); *Osmers v. Parade Publications, Inc.*, 234 F.Supp. 924, 926 (S.D. N.Y. 1964); *Tocco v. Time, Inc.*, 195 F. Supp. 410, 413 (E.D. Mich. 1961); *McGlue v. Weekly Publications, Inc.*, 63 F. Supp. 744, 745 (D. Mass. 1946).

The California Court of Appeal has said that the cause of action arises "upon the first general distribution of the publication to the public." *Belli v. Roberts Brothers Furs*, 240 Cal. App. 2d 284 (1966). New York's highest court held the claim accrues "when the finished product is released by the publisher for sale in accord with trade practice." *Gregoire v. G.B. Putnam's Sons*, 298 N.Y. 119, 81 N.E. 2d 45, 49 (N.Y. Ct. App. 1948). These are generalized statements, and the court must determine at what point in the publication process a book is first considered "published" for purposes of the single publication rule.

A number of courts have held that publication occurs when the alleged libelous material is placed in the hands of common carriers for shipment to distributors. *Backus v. Look, Inc.*, 39 F. Supp. 662, 663 (S.D. N.Y. 1941); *National Cancer Hospital of America v. Confidential, Inc.*, 151 N.Y.S. 2d 443 444-45 (N.Y. Sup. Ct. 1956); *Tocco*, 195 F. Supp. at 413. *Cf., Novel v. Garrison*, 294

F. Supp. 825, 833-34 (N.D. Ill. 1969). The Second Circuit has rejected this approach, arguing that delivery to shippers is a premature point in the distribution process to be considered "publication." *Zuck v. Interstate Publishing Corp.*, 317 F.2d 727, 732-33 (2d Cir. 1963). *See also Osmers*, 234 F. Supp. at 926-27. This court agrees, since it is not even theoretically possible that plaintiff or a member of the general public would have had access to the book during shipment.

A more reasonable date to use for "publication" is the date when the first copies of the general distribution of the book went on sale to the pubic. *Cf.*, *Zuck*, 317 F.2d at 733; *Belli*, 240 Cal. App. 2d at 289; *Kilian v. Stackpole Sons, Inc.*, 98 F. Supp. 500, 503-4 (M.D. Pa. 1951). Choosing one day as "the" date of publication is, of necessity, a somewhat arbitrary decision. Using the date the book first went on sale is desirable because it is a firm, easily verifiable date of actual access to the book by the public. It is much less arbitrary than trying to decide when "most" copies were distributed. And, since it is immaterial whether plaintiff was aware that publication had occurred, *Johnson v. Harcourt, Brace, Jovanovich, Inc.* 43 Cal. App. 3d 880, 895-96 (1974), there is no reason to try and define "publication" as the time when distribution would have spread to plaintiff's state of residence.

Plaintiffs place heavy reliance on the *Osmers* case, *supra*, where the court stated that the sale of a few advance copies prior to the general release date would not start the running of the statute of limitations. *Id.* at 927. The concern is that a publisher could release a few copies of libelous material, quietly allow the statute of limitations to run, and then proceed with a mass distribution with impunity. *Id.*; *Zuck*, 317 F.2d at 731-2 n.7. It is for this very reason that this court holds that publication occurs when the first copies of the *general* distribution of the book

go on sale. The instant case is distinguishable from *Osmers* because here the distribution was a full and widespread release of the book, with 10,000 copies being shipped every day. The copies placed on sale in New York were not part of a "pre-release" distribution.

Plaintiffs argue that in many of the cases cited by defendants there were a substantial number of copies of the publication sold by the date the court fixed as the "publication" date. A close examination of the cases, however, demonstrates that the courts were merely pointing out how strongly the evidence indicated that publication had already occurred prior to the key date. *See, e.g., Tocco,* 195 F. Supp. at 412-13. Obviously there was no need for the courts to decide whether the statute would have started running when the first copies were placed on sale, since the lawsuits before the courts were not timely filed even if the statute had started running after most copies had been sold.

A realistic appraisal of the affidavits on file, particularly those indicating that 10,000 copies were shipped on November 10, 1978 and delivery time was one day to New York, demonstrates that many stores other than the Harper & Row Bookstore would have received and placed on sale the book prior to November 16, 1978. *Cf., Hartmann v. Time, Inc.*, 166 F.2d 127, 135 (3d Cir.), *cert. denied*, 334 U.S. 838 (1948). The court does not base its decision on this finding, since the placing of copies on sale at the Harper & Row store was sufficient to start the running of the statute, but these facts do give added support to the court's decision.

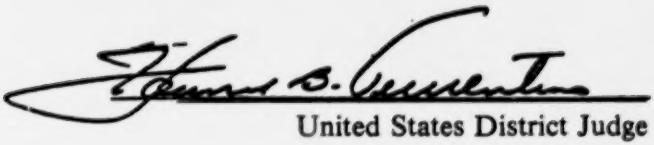
The affidavits on file show, without contradiction, that nationwide distribution of "Love Signs" began on November 10, 1978, with the book first available on the shelves of retail book stores for purchase by the public on November 13, 1978. The cause of action accrued prior to November

16, 1978, thus the complaint filed November 16, 1979 is time barred.

Defendants' motion for summary judgment is GRANTED. Each party shall bear their own costs.

SO ORDERED.

DATED: July 13, 1981



United States District Judge

COPY TO:

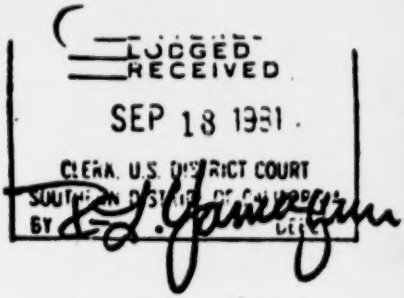
STANLEY FLEISHMAN, Esq.
433 North Camden Dr., Suite 900
Beverly Hills, CA 90210

IRWIN GOSTIN, Esq.
110 West A Street, Suite 1690
San Diego, CA 92101

PAUL P. SELVIN, Esq. of
Selvin & Weiner
1900 Avenue of the Stars
Suite 2400
Los Angeles, CA 90067

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA



DARCIA M. FLEURY, DONALD L. FLEURY, SUSAN ADELE FLEURY, and DARLEEN ANN FLEURY,

Plaintiffs,

v.

HARPER & ROW, PUBLISHERS, INC., a foreign corporation; MANNITOU ENTERPRISES UNLIMITED, INC., a foreign corporation; and LINDA GOODMAN,

Defendants.

Civil No. 79-1851-T

O R D E R

The motion of plaintiffs for an Order to Alter or Amend the Judgment dated July 14, 1981 came on for hearing before the Honorable Howard B. Turrentine on August 24, 1981. The court duly considered the Motion of the plaintiff including all pleadings and papers filed in this matter.

Plaintiffs urge that the decision in *Zuck v. Interstate Publishing Co.*, 317 F.2d 727 (2nd Cir. 1963), compels this court to alter the prior judgment granting the defendant's motion for summary judgment. Contrary to plaintiff's assertion, *Zuck* does not hold that nationwide sales are a *prerequisite* to accrual of the libel claim. Rather, *Zuck* simply recognized that the publication in question did go on sale "to the public at newsstands throughout the United States" on December 22, 1962 and thus the action accrued at that point. *Zuck*, supra at 733. A requirement of national distribution, as the plaintiff urges this court to

adopt, ignores the well established principle that the cause of action accrues even if the plaintiff is unaware that a cause of action exists. *Johnson v. Harcourt, Brace, Jonanovich, Inc.*, 43 Cal. App. 3d 880 (1974). Moreover, requiring national distribution would force both litigants and the courts to make find distinctions as to what constitutes "nationwide" distribution.

Plaintiffs also point to the case of *Williams v. RHG Publishing*, 7 Med. Law Rptr. 1372 (N.Y. Sup. Ct., April 223, 1981) as requiring this court to amend its July 14, 1981 judgment. *Williams*, however is distinguishable because there was no evidence in that case which indicated that a general release had taken place.

This court recognizes that choosing one day as the "date of publication" is somewhat arbitrary. However, it is essential that a specific, easily identifiable date be chosen so that litigants can easily identify the date the cause of action accrues and correspondingly the date the cause is extinguished by the statute of limigations. Therefore, this court holds that the cause of action accrues when the first copies of the general distribution of the book go on sale. Since the books of the general distribution went on sale before November 16, 1978 the action is time barred.

Accordingly, IT IS ORDERED that plaintiff's motion be and hereby is denied.

DATED: September 17, 1981.

United States District Judge

COPY TO: (see page)

STANLEY FLEISHMAN, Esq.
433 North Camden Dr., Suite 900
Beverly Hills, CA 90210

IRWIN GOSTIN, Esq.
110 West A Street, Suite 1690
San Diego, CA 92101

PAUL P. SELVINS, Esq. of
Selvin & Weiner
1900 Avenue of the Stars
Suite 2400
Los Angeles, CA 90067

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 10 1983
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

DARCIA M. FLEURY, DONALD L. FLEURY, SUSAN ADELE FLEURY, and DARLEEN ANN FLEURY,

Plaintiffs-Appellants,

vs.

No. 81-5830

HARPER & ROW, PUBLISHERS, INC., a foreign corporation; MANNITOU ENTERPRISES UNLIMITED, IND., a foreign corporation; and LINDA GOODMAN,

Defendants-Appellees.

ORDER

Appeal from the United States District Court
for the Southern District of California
Howard B. Turrentine, Chief District Judge, Presiding
Argued and submitted, September 7, 1982

Before: ELY and CHOY, Circuit Judges, and THOMPSON,* District Judge

The petition for a rehearing is hereby denied.

I HEREBY CERTIFY that all judges have concurred in the foregoing Order.

UNITED STATES DISTRICT JUDGE

*Honorable Bruce R. Thompson, Senior United States District Judge, District of Nevada, sitting by designation.

APPENDIX D

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3340 Ocean Park Boulevard, Suite 3005, Santa Monica, California 90405: that on July 6, 1983, I served the within *Petition for A Writ Of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

U.S. Supreme Court
1 First St., N.W.
Washington, D.C. 20543
forty copies

Paul P. Selvin
Selvin and Weiner
A Professional Corporation
1900 Avenue of the Stars, Suite 2400
Los Angeles, California 90067
3 copies

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 6, 1983 at Santa Monica, California.

Kirk W. Harney
(Original signed)